Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Telecommunications Act of 1996:	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended	)	CC Docket No. 96-149

COMMENTS OF U S WEST, INC.

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March 30, 1998

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SUMMARY

U S WEST herein comments on the Commission's FNPRM in this docket.[1] We argue that no further rules are necessary with respect to Section 222 implementation or compliance. As the Commission noted in its CPNI Order, Congress created a statutory structure in which customer approval is inferred for Section 222(c)(1) uses of CPNI. The Commission should defer to this Congressional model, leaving to businesses to handle those idiosyncratic cases in which a customer might want to "restrict" his/her CPNI with respect to such uses.

Additionally, no further rules are necessary with respect to Sections 222(a) or (b). The statute is clear on its face, and the information affected by those provisions is quite often jointly proprietary. To the extent a carrier violates the proscriptions of Sections 222(a) or (b), the Commission has existing and adequate enforcement powers to address such violation.

Finally, U S WEST defers comment on the FBI proposal until the comments of others are filed. We reserve the right to comment on this matter in Reply.

[1] All acronyms or abbreviations used in this Summary are fully identified in the text.

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COMMENTS OF U S WEST, INC.

I. THE COMMISSION SHOULD NOT PROMULGATE ANY FURTHER SECTION 222 RULES

The Federal Communications Commission ("Commission") seeks further comment on four issues involving Section 222:[1] (1) the extent to which an individual can "restrict carrier use of [Customer Proprietary Network Information] CPNI for all marketing purposes;"[2] (2) "the appropriate protections for carrier information and additional enforcement mechanisms" that might be necessary;[3] and

[1] In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, Second Report and Order ("CPNI Order") and Further Notice of Proposed Rulemaking ("FNPRM"), FCC 98-27, rel. Feb. 26, 1998.

[2] CPNI Order ¶ 5; FNPRM ¶¶ 204-05.

[3] CPNI Order ¶ 5; FNPRM ¶¶ 206-07.

(3) the "foreign storage of, and access to, domestic CPNI."[4] Below, U S WEST, Inc. ("U S WEST") comments on these issues in some detail.

We argue that no further extension of "rights" with respect to CPNI associated with a customer's "total service" is appropriate, in light of the absence of any Congressional suggestion that any such "rights" exist. In addition, we oppose any further Commission rules with respect to Section 222. As Telecommunications Resellers Association ("TRA") itself acknowledges, Sections 222(a) or (b) are "remarkably clear and direct."[5] They need no further Commission "interpretation." Nor are any implementing rules necessary. Finally, U S WEST reserves until the Reply round any comment on the proposal by the Federal Bureau of Investigation ("FBI").

A. The Commission Need Not Promulgate Rules Regarding CPNI Use Within A "Total Service" Context

In its CPNI Order, the Commission repeatedly structures its analysis of the meaning of Section 222 around what it purports to be obvious Congressional intent and word choice.[6] Similarly, the Commission should be guided here by the absence of any Congressional language suggesting that a carrier needs customer approval to use CPNI within the confines of a Section 222(c)(1)(A) or (B) context (or stated in the converse as the Commission poses the matter, that a customer can "restrict"

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[4] CPNI Order ¶ 5; FNPRM ¶¶ 208-10.

[5] Comments of the Telecommunications Resellers Association, CC Docket No. 96-115, filed June 11, 1996 at 9 ("TRA Comments").

[6] See, e.g., CPNI Order ¶¶ 23-24, 32-41. And see FNPRM ¶ 212 (stating the Commission's findings/holding exclusively in terms of what the statute requires).

CPNI within such context). As the Commission correctly observes, in Section 222(c), Congress crafted a CPNI structure in which customer approval was "inferred" in such context.[7] The Commission should defer to that Congressional model.

From a policy perspective, as well,[8] the Commission should demur from further action in this area for several reasons. **First,** there is no record to support that a customer deems itself to have a particular "privacy" interest with respect to CPNI to the extent that CPNI never goes beyond the corporate enterprise in which the customer has a relationship.[9] **Second,** the use of CPNI (like other transactional

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[7] CPNI Order ¶¶ 23-24.

[8] In its CPNI Order, the Commission held that, in addition to what it found to be the express requirements of Section 222, it was requiring affirmative customer approval to use CPNI beyond the "total service" as a policy matter. Id. ¶¶ 53-67.

[9] The Commission failed to make a case for such privacy interest in its CPNI Order. In support of its position, it merely pointed to its own experience (id. n.98) (which obviously fails to reflect common commercial practice or the expectations of the parties to such a relationship), to general individual concerns over privacy matters across industry and market segments (id. ¶ 62; here the Commission cited to U S WEST's assertion that customers did not suffer from "'privacy angst'" and stated that other sources suggested the opposite. The Commission did not, however, accurately paraphrase U S WEST's argument which was that such "angst" was not demonstrated within the confines of the commercial relationship, nor did the "opposing" citations offered up by the Commission address privacy concerns within such relationships), and to the failure of others to prove (in the Commission's opinion) that privacy concerns did not exist (rejecting the Westin and Cincinnati Bell Telephone Company ("CBT") studies (id. ¶¶ 61-62, 101 and nn.230, 387).

The Commission's dismissal of the significance of the Westin study because it used the word "normally" to describe an activity that -- in fact -- "normally" and routinely occurs and because of the wording and ordering of his questions represents a sort of regulatory hubris. Professor Westin's expertise in the area of privacy, particularly informational privacy, is without equal as demonstrated by his *curriculum vitae*. Furthermore, his capabilities in the area of crafting public opinion surveys and ordering questions to fairly measure and record that opinion

data collected by other commercial enterprises and industries) to target an individual for a communication (whether that communication be a marketing communication or another type of communication), generally advances that aspect of a customer's privacy interests that equate with the desire to be left alone. The use of such information allows speakers to avoid shot-gun communications to an overly broad audience of listeners, permitting the communication to be targeted to those most likely to be interested and receptive.

Third, to the extent that any of those individuals whose "total service" CPNI is used to craft and target speech to them do not wish to be communicated with either at the time of the attempted communication or in the future, the individual need only ask not to be communicated with. If the communication is accomplished through telemarketing, such a request calls into play the Telephone Consumer Protection Act of 1991 and the Commission's implementing rules.[10] If the communication is through a direct mailing, businesses interested in maintaining the good will of their customers within the scope of a quality relationship, will accommodate the customer's expressed wishes.

Carriers are comprised of business people. They know how to run their businesses and maintain customer confidentiality. If they didn't, the Commission

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has been acknowledged (in Reports to Congress) by a sister agency far more involved in the matter of marketplace privacy than the Commission. See FTC Report on Public Workshop on Consumer Privacy on the Global Information Infrastructure, December, 1996 (references to Westin primarily in footnotes); Report on Individual Reference Services, A Report To Congress, December, 1997 (references to Westin primarily in footnotes).

[10] 47 U.S.C. § 227; 47 C.F.R. § 64.1200.

would have heard lots more about "privacy violations" (such usually causing some substantial amount of press coverage) before now. But it hasn't -- for the simple reason that there is trust within the relationship and the CPNI is not made available to unaffiliated third parties.[11] While the Commission found such facts to be unpersuasive with respect to its CPNI Order, it should at least find them probative in the area where Congress itself acknowledged the propriety of the CPNI use.

B. No Implementing Rules Regarding Sections 222(a) Or (b) Are Necessary

While the Communications Act previously contained no express directive regarding appropriate versus inappropriate uses of information received or recorded by network providers in the course of their provision of wholesale services,[12] Section 222(b) now creates such an express prohibition with respect to the use of the information for a collecting carrier's marketing purposes. And, as noted above, even advocates of Commission insinuation into this area admit that Sections 222(a) or (b) are "remarkably clear and direct."[13]

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[11] The Commission speculates that carriers might sell their information (CPNI Order n.95), absent any fact in the record -- at least to U S WEST's knowledge -- that suggests any present intention by any carrier to do so. Despite the theoretical and speculative nature of the Commission's remark, certain press coverage focused on how the Commission "stopped" carriers from selling their information. See Appendix A (attached hereto) from the Denver Post, Friday, March 6, 1998. Of course, in reality, the Commission stopped nothing, since no selling was occurring.

[12] TRA argues that certain uses have always been inappropriate and unfair, amounting to a form of theft. TRA Comments at 2, 6. Had such been so obvious, however, it is doubtful that resellers would have needed to press for a statutory provision in the nature of Section 222(b).

[13] Id. at 9.

Given that clarity, and given that the information at issue is often jointly proprietary (a matter discussed at greater length immediately below), the Commission need not promulgate any rules in this area. In particular, it should not promulgate "personnel" or "mechanical access restrictions."[14] Neither are required.[15]

TRA's own advocacy demonstrates the extent to which the statute, on its face, incorporates the relevant mandates and proscriptions. Indeed, the bulk of TRA's "recommendations" are not in that nature of proposed rules but, rather, in the nature of "guiding principles" or "statements of policy."

It is time to reject the advocacy of those who would have the Commission treat network providers -- particularly incumbent local exchange carriers ("LEC") -- as criminals before the fact. Rather, the more appropriate policy is to assume they can understand straight-forwardly drafted statutory provisions and comply with them. The latter approach far better reflects the de-regulatory, pro-competitive thrust of the Act than does the promulgation of additional rules and regulations.

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[14] FNPRM ¶ 206.

[15] The Commission incorrectly characterizes U S WEST's advocacy as one "indicat[ing] that safeguards beyond access restrictions may be appropriate and technically feasible in the context of their wholesale services operations." FNPRM n.706. While we did indicate that we already had safeguards in place with respect to Sections 222(a) and (b) compliance, we never indicated that those safeguards were or needed to be "beyond" mandated, regulatory "access restrictions." Indeed, Section 222(b) specifically speaks in terms of "uses" and any additional regulatory mandates with respect to the provisions of that statute should similarly be directed at "uses."

1. The Information Addressed By Those Statutory Provisions Is Often Jointly Proprietary

In a number of places in its CPNI Order and its FNPRM, the Commission states that it is seeking comment on what safeguards might be necessary "to protect the confidentiality of carrier information, including that of resellers" and other service providers, such as information service providers.[16] Absent from its general statement of this issue is the fact that, under Sections 222(a) and (b), carriers are only obligated to accord confidentiality to customers' and other carriers' proprietary information.[17]

Like CPNI, information that relates to a carrier (the language of Section

[16] See, e.g., CPNI Order ¶ 5; FNPRM ¶¶ 206, 247 (Paperwork Reduction Act Analysis). In almost every case, the Commission uses the awkward phrasing of "carrier information, including that of resellers and information service providers," as if information service providers are carriers -- which, of course, they are not when acting in that capacity. While the Commission has, on occasion incorporated information service providers into its rules as "telecommunications service providers" (see 64.1201(a)(2)), they clearly are not generally so considered under Commission precedent and statutory definition. Information service providers are often "customers" of carriers and, as such, would be included in the general confidentiality obligations of Section 222(a). However, they are not carriers with respect to Section 222(b).

[17] The Commission reflects some intuitive or inherent appreciation for this limiting principle when it discusses protections being necessary for "competitively-sensitive information of other carriers." FNPRM ¶ 206. However, what is "competitively sensitive information" varies based on timing (what is "competitively sensitive information" today might not be tomorrow) and prior disclosure by the entity whose information it is. For example, business entities routinely disclose market share and deployment plans with the press, analysts, in annual SEC filing and on Web sites. Such information might have been competitively sensitive at some point, but no longer is once the disclosure has been made. Thus, using "competitively sensitive" as the standard by which to assess when a Section 222(a) or (b) obligation presents itself is a less workable standard than that identified in the statute, i.e., the information must be "proprietary." The Commission should be guided by the statutory language in any regulatory activity it undertakes in this area.

222(a)) or was received or obtained from a carrier (the language of Section 222(b)) -- even if proprietary to the carrier to whom it relates or from whom it was obtained -- will often also be proprietary to the receiving carrier or the carrier in the possession of the information. That is, a single "transaction" creates a set of dual proprietary rights: the fact that a carrier purchases a service is proprietary to the purchasing carrier; the fact that a carrier provides a service is proprietary to the providing carrier.[18] For this reason, caution must be exercised in blanketly accepting assertions such as those proffered by TRA that network providers somehow "abuse" their position or the "confidential, competitively-sensitive data" of resellers when they make use of information disclosed by those providers or other carriers seeking "to obtain network services."[19]

Network providers (whether operating in a "wholesale" or "retail" capacity)[20] themselves have a proprietary claim over what is generated by them with respect to service provisioning and what is recorded on their networks. There is nothing "abusive" or "unlawful" about such a situation. Nor is it inherently an anticompetitive one.

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[18] Indeed, the Billing and Collections contracts that have been entered into by U S WEST and other carriers make the above concept explicit. Negotiated between competent entities in a non-regulatory commercial context (wherein it would be expected that each party is negotiating to protect and advance its own commercial interests), those contracts acknowledge that both parties claim a proprietary interest in traffic and usage data on a carrier's end users recorded by U S WEST and leave to each party the right to assert an exclusive proprietary interest in such data in any appropriate forum.

[19] TRA Comments at 3-4.

[20] Compare FNPRM ¶ 206.

For this reason, the Commission must be careful to avoid restraining "uses" of such information when such uses are not "marketing uses," even in a "policy statement."[21] For example, there is no reason to limit a network provider's use of resale carrier information to service provisioning and billing only, as proposed by TRA's Recommendation No. 1.[22] Such information is critical not only for such purposes but for network planning, design and development, as well as the financial management of the network provider.

There are other lawful uses of the information, as well, that are far afield of prohibited "marketing" uses. Indeed, a review of the Section 271 filings before the Commission make clear that a network/wholesale provider is lawfully entitled to make explicit and disclose the services it provides to other carriers. Without such a disclosure in some form,[23] it would be impossible for that provider to prove that competitive entry was occurring.

The above arguments are even more compelling when the subject of jointly proprietary information is analyzed within the context of the use by the network provider of information in the aggregate. Indeed, in the context of Billing and

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[21] Reply Comments of TRA, CC Docket No. 96-115, filed June 26, 1996 at 2 ("TRA Reply").

[22] TRA Comments at 9-10. See also TRA Reply at 2. It is clear that TRA proposes these restrictions in order to prevent the use of the information for marketing purposes. Of course, a clearer, more direct way to accomplish the goal proposed by TRA is to prohibit the objectionable purpose rather than outline "acceptable" purposes.

[23] It is possible that the disclosure could be made under a protective filing, and the choice whether to pursue this approach over a public disclosure is obviously one for each carrier to make.

Collection contracts negotiated between U S WEST and other carriers, it is explicitly stated that aggregate carrier information eliminates any proprietary claim by the non-network provider carrier.[24]

The generalized notion of "jointly proprietary information" undoubtedly was part of the landscape that led to the "disputes" outlined in the comments of TRA between its members and their respective network providers. However, as the comments of TRA make clear, it is not the general notion of jointly proprietary information that fed the ire of the resellers, but the putative use by network providers of the names and service offerings of the customers being served by the resellers.[25]

2. TRA's "Recommendations" Do Not Require Codification

Given the clear language of Sections 222(a) and (b), U S WEST opposes TRA, as well as those who join them, in its position that additional "safeguards"[26] or "teeth"[27] or proscriptive Commission rules[28] or "clear guidance"[29] are necessary with

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[24] For example, U S WEST's contracts state that when carrier-specific traffic and usage data is commingled in the aggregate of all interexchange carriers ("IXC") traffic and usage data and is no longer identifiable as a subpart, it shall not be deemed proprietary to the specific IXC.

[25] See generally TRA Comments at 5 (discussing the disclosure of the subscriber list by the reseller to the network provider), 6-7 (describing TRA's dispute with AT&T).

[26] Id. at 3.

[27] Id. at 7.

[28] Id. at 9 (while agreeing that little, if any, interpretation of Section 222(b) is required, TRA argues that "implementing regulations [are] essential"); Comments of Frontier Corporation, CC Docket No. 96-115, filed June 10, 1996 at 10-11.

[29] Comments of Cable & Wireless, Inc., CC Docket No. 96-115, filed June 11, 1996 at 4-5, 12-13.

respect to its implementation or enforcement. Furthermore, TRA's advocacy is often internally inconsistent. For example, it states that it did "not necessarily disagree with the Notice's tentative conclusion that the Commission *should not specify precise safeguards against unauthorized access* to the competitively-sensitive data of resale carrier customers[,]"[30] but then -- in the same paragraph -- argues that "network providers should be required to *deny all marketing personnel access* to the confidential data of their resale carrier customers."[31]

As conceded by TRA itself, often the requests for Commission assistance in this regard are simply redundant.[32] At other times, the requests are more in the nature of requests for the Commission to set the right course or express its commitment to enforcement "for violations of the Sections 222(a) or (b)."[33]

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[30] TRA Comments at 10 (emphasis added), citing to Notice at ¶ 36 In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Notice of Proposed Rulemaking, 11 FCC Rcd. 12513, 12528-529 ¶ 36 (1996) ("Notice").

[31] Id. at 11 (emphasis added).

[32] Id. at 10. TRA is correct in its observation. For example, since the statute itself prohibits a network provider from using the information for marketing purposes, what purpose could possibly be served by a Commission-prescribed imposition "on network providers . . . to safeguard [the information] against unauthorized disclosure and abuse by their marketing personnel" or to "shield[ ] [the information] from marketing personnel." Id.

[33] See, e.g., TRA's Recommendation 3, regarding the imposition of "strict liability" on carriers who violate Section 222(a) or (b). TRA Comments at 11-12. See also TRA Reply at 3. TRA's discussion in this area is unduly vague. At times it appears that what TRA really means is that network providers should bear the burden of demonstrating that a "bad act" did not occur or defending an action that might have occurred, i.e., a sort of "shifting of burden." TRA Comments at 11-12. At other times, it appears that TRA is arguing that if a violation of the obligations outlined in Section 222(b) is proven, liability of some sort will follow. Since the former

The only TRA recommendation that actually seems to be envisioning a "rule" is that dealing with "laundering" of information, TRA's Recommendation 4.[34] While TRA posits a hypothetical situation involving "laundering" of information, its description is so oblique and lacking in detail that it is impossible to comment on it in any meaningful way. Certainly, before TRA's suggestion that the Commission "declare unlawful" the activity described,[35] a more complete explanation of the proposed prohibited activity should be provided.

Furthermore, with respect to TRA's discussion regarding its Recommendation 4, U S WEST points out that there is nothing inappropriate about a network provider knowing that customers that are not theirs are customers of other carriers. Inherently, such knowledge is a natural byproduct of knowing who your own customers are and knowing that there are more customers than those that you serve. Nor is there anything inappropriate with a network provider contacting potential or new customers (who, by definition, are customers of other carriers). The "evil" TRA ostensibly seeks to curtail or prohibit is the contacting of potential

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argument generally is controlled by the law associated with the presentation of a prima facie case, and the latter is almost a certainty in any event (i.e., that liability will follow a violation), it is totally unclear why any Commission regulations beyond those already in existence are necessary.

Similarly, TRA's Recommendation 5 (TRA Comments at 12-13; and see id. at 7), recommending that the Commission be vigilant and harsh with respect to its enforcement actions, seems precatory rather than in the nature of a proposed rule. Of course, the Commission need not enact a rule regarding enforcement of Section 222, since ample statutory and regulatory authority already exists to accomplish this objective.

[34] TRA Comments at 12; TRA Reply at 3.

[35] TRA Reply at id.

customers by network providers where the contact is based on the specific information gleaned by the network provider about the reseller-customer relationship.[36] However, TRA is not so specific in its request.

Because the matters TRA would have the Commission opine on either through a "policy statement" or formal regulations are already addressed by the straightforward language of Section 222(b), no further regulations are necessary. Resellers such as TRA can clearly utilize that section as written to vet their proprietary information issues with a more focused challenge than was available to them in the past, either through a Commission complaint or a lawsuit.[37]

C. The FBI's Request Regarding Keeping CPNI On Shore

U S WEST will review the comments of the filing parties and respond more fully to this issue in Reply.

II. CONCLUSION

For all of the above reasons, the Commission need not promulgate further rules under Section 222(c)(1) dealing with internal use of CPNI within a "total

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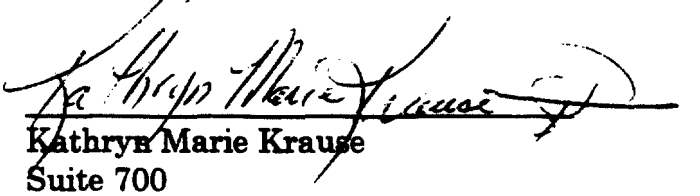
[36] See note 25, supra.

[37] While not pressing its argument in quite the way U S WEST here uses it, even TRA notes that the "key" to winning the second half of its long-fought advocacy (the first half being won with the passage of Section 222(b)) is that the statute be "enforceable and enforced." TRA Comments at 7. See also MCI Ex Parte, filed Mar. 11, 1997, identifying a number of cases involving allegations of Section 222(b) violations. And see Comments of MCI, CC Docket No. 96-115, filed June 11, 1996 at 6, Reply Comments of Sprint Corporation, CC Docket No. 96-115, filed June 26, 1996 at 6 (arguing that billing information provided to LECs by IXCs is proprietary to them, something which, at least to some degree, U S WEST agrees with as is obvious from the above discussion). In addition, in October, 1997, PR NEWSWIRE reported a lawsuit between AT&T and Ameritech over AT&T's use of proprietary

service" context or implementing rules under Sections 222(a) or (b).

Respectfully submitted,

U S WEST, INC.

By: 

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customer information associated with a mutual card honoring agreement and litigation in the Northern District of Illinois.

Appendix A

The sale of privacy

Threats to personal privacy no longer come just from the government, but from the vast data collections that businesses maintain on customers and potential customers.

Several trade groups claim they have taken steps to shield people from unwarranted snooping, but in truth most industry guidelines — as well as government statutes and regulations — do little to help Americans keep their personal information private.

But now a bright spot may appear in this otherwise gloomy outlook for privacy.

When you use a pager or make a long-distance or cellular phone call, you probably assume that whom you call is a private matter, and that in any case, the information doesn't spread beyond the phone company that bills you.

Wrong. Information about whom you call, how often, how long you talk to them and how much you spend for that service currently may be sold even without your consent of knowledge.

It's a nightmarish scenario that threatens the right to privacy on which other essential liberties, such as the right to express ideas and the right to associate with others, are based.

Recently, though, the Federal Communications Commission agreed to clamp down on the trade in individuals' phone records. The new rules that go into effect this spring require telephone, cellular and paging companies to get customers' permission before selling such revealing personal data.

This approach represents a fundamental shift that should be applied to other industries, too.

Usually, businesses that create computer data bases on customers assume they can sell that information to whomever they please. There are a few laws regulating this practice, but even supposedly very private data — such as medical records — are far less protected than most individuals believe.

Marketing companies pretend that consumers have the ability to say no, but that claim involves Alice-in-Wonderland logic: Consumers are expected to navigate a maddening maze of formal letter-writing — not just to direct mail companies, but even to their own banks or retailers — to stop data transactions they don't know are taking place.

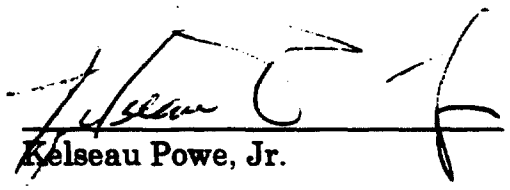
In this regard, the FCC's new rules have put in place one sandbag against a rising flood of intrusive data collection and sales practices. Many more such legal protections are sorely needed.

In this column alone is The Denver Post's opinion expressed.

21.

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 30th day of March, 1998, I have caused a copy of the foregoing **COMMENTS OF U S WEST, INC.** to be served, via hand delivery, upon the persons listed on the attached service list.



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